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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

BOYD S. LEEDOM, *et al.*, INDIVIDUALLY AND AS CHAIRMAN AND MEMBERS OF AND CONSTITUTING THE NATIONAL LABOR RELATIONS BOARD,

Petitioners,

v.

WILLIAM KYNE, INDIVIDUALLY AND AS PRESIDENT OF BUFFALO SECTION, WESTINGHOUSE ENGINEERS ASSOCIATION, ENGINEERS AND SCIENTISTS OF AMERICA, A VOLUNTARY UNINCORPORATED LABOR ORGANIZATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 633

BOYD S. LEEDOM, *et al.*, Individually and as Chairman and Members of and Constituting The National Labor Relations Board,

Petitioners,

v.

WILLIAM KYNE, Individually and as President of Buffalo Section, Westinghouse Engineers Association, Engineers and Scientists of America, a Voluntary Unincorporated Labor Organization,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinions Below.

The opinion of the Court below (Pet., Appendix A, pp. 17-20) is not yet reported. The findings, conclusions and order of the District Court, also unreported, are set forth at R. 24-32.

Jurisdiction.

The jurisdictional requisites are adequately set forth in the Petition.

Question Presented.

Whether a Federal District Court has jurisdiction to set aside a certification, issued by the National Labor Relations Board under Section 9 (c) of the National Labor Relations Act, as amended, upon suit brought by the labor organization receiving the certification where the Board admits that it acted without statutory authority in establishing the bargaining unit covered by the certification.

Statutes Involved.

All relevant statutory provisions are set forth in the Petition in Appendix B, pp. 22-26.

Statement.

A. The Board representation proceeding giving rise to this suit.

Following a representation proceeding instituted by a Petition filed on October 15, 1955 by respondent (hereinafter called Engineers Association), the Board issued its Decision and Direction of Election on May 28, 1956, finding appropriate a mixed unit of professional and non-professional employees at the Cheektowaga, New York plant of the Westinghouse Electric Corporation (R. 16-17, 27-28). The aforesaid bargaining unit comprised 233 employees in 10 engineering job categories who were found by the Board to be professional employees within the meaning of Section 2(12) of the Act, and 9 employees in 3 job categories who were found by the Board to be non-professional employees. Over the objections of Engineers Association (R. 13, 18, 28), the Board included the 9 non-professional employees in the same bargaining unit with the

professional employees without complying with Section 9(b)(1) which states:

> "Provided, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; * * *"

The Board refused to conduct the separate election for the professional employees required by Section 9(b)(1)[1] on the ground that the non-professional employees in question shared a "close community of employment interest" with the professional engineers and on the further ground that the inclusion of the 9 non-professionals would not "destroy the predominantly professional character" of this unit for the professional engineering employees (R. 5, 14-16, 27).[2]

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[1] The conduct of a 9 (b) (1) election differs from the usual representation election in that separate ballots are given the professional employees on which they are asked to indicate whether they favor inclusion in a unit with non-professional employees or wish to be represented in a separate unit. If a majority of professional employees vote in favor of inclusion in a unit with non-professional employees, their ballots are added to those of the non-professional employees in the tally of choice of bargaining representative. If the professional employees vote in favor of a separate unit, their ballots are segregated and separately tallied as to choice of bargaining representative. See *Westinghouse Electric Corporation*, 107 NLRB 16, 17-19; *Sonotone Corporation*, 90 NLRB 1236, 1240-42.

[2] In the Board's view, Congress intended when it wrote Section 9 (b) (1) solely to protect the professional employees from being engulfed by the inclusion of a superior number of non-professional employees in the same bargaining unit. Consequently, the Board argues, the inclusion of a minor number of non-professional employees in the same bargaining unit without regard to the statutory requirement that the professional employees affirmatively indicate by vote their wishes in the matter, cannot possibly impede the professional employees in the effective exercise of their collective bargaining rights (Pet., pp. 5-6, note 6). The Board's preoccupa-

On June 14, 1956, the usual election by secret ballot was conducted by the Board in a mixed unit. Professional employees were not afforded the opportunity to vote as to whether or not they desired to be commingled (R., pp. 6, 19, 29). In the election, a majority of the employees designated the Engineers Association as their collective bargaining representative (R., pp. 6, 21-22, 29).[3]

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tion with legislative history to the exclusion of the plain terms of the statute reminds one of "the canon of construction of the wag who said, when the legislative history is doubtful, go to the statute." *Greenwood* v. *United States*, 350 U. S. 366, 374. Even assuming that the contemporary legislative history indicates Congressional concern for the circumstance where professional employees are outnumbered by non-professionals "the language used in the statute goes beyond this limited purpose". *National Labor Relations Board* v. *Lion Oil Co.*, 352 U. S. 282, 1 L. ed. 2d 331, 339.

The language of Section 9 (b) (1) makes no distinction between the ratio of professional to non-professional. Nor does it speak in terms of the "close community of employment interest" which non-professional employees may otherwise have with professional employees. The command of Section 9 (b) (1) is simple and unequivocal. It directs a separate election for professional employees in all circumstances in which the Board proposes to include them in the same bargaining unit with non-professional employees. The "obvious effect of the proviso [Section 9 (b) (1)] is merely a limitation of the Board's power to create a mixed unit." *Westinghouse Electric Corporation* v. *National Labor Relations Board*, 236 F. 2d 939, 943 (C. A. 3).

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[3] At note 5, pages 5-6 of its Petition the Board indicates that it has uniformly followed an administrative rule of "predominantly professional" in avoiding Section 9 (b) (1) elections since the inception of the amended Act. Suffice it to say that the instant case presents the first challenge to the Board's restrictive application of this section. Manifestly an erroneous disregard of a statutory provision does not become any the less erroneous with the mere passage of time. Moreover, the Board's reference to the statements of its construction of Section 9 (b) (1) before the Joint Committee on Labor-Management Relations, 80th Cong., 2d Sess., pp. 1147-1148, and in the 13th and 14th Annual Reports, do not, as the Board implies, signify Congressional approval of the Board's restrictive application of Section 9 (b) (1). Cf., *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U. S. 361, 365-366. Chairman Paul M. Herzog, in the very statement cited in the Board's Petition, recognized the Board's administrative practice of giving limited effect to Section 9 (b) (1) as less than "100% good law. I think it was more than 50% good law and extremely good administrative practice."

B. The Instant Suit.

On July 12, 1956, respondent commenced this suit in the district court for the purpose of compelling the Board to set aside the certification and to conduct a new election in accordance with Section 9(b)(1). The jurisdiction of the court was founded on 28 U. S. C. 1337 and Section 10 of the Administrative Procedure Act, 5 U. S. C. 1009 (R. 2). The gravamen of the complaint was that the Board "exceeded the scope of [its] statutory authority" and "failed and refused to comply with Section 9(b)(1) of [the] Act," i.e., commingled professional and non-professional employees in the same bargaining unit without first affording the professional engineering employees a separate election to determine whether or not they desired to be included with the non-professional employees (R. 7-8).

On December 3, 1956, the district court granted respondent's cross-motion for summary judgment and denied the Board's motion (R. 23). The district court held that jurisdiction existed to entertain the merits of the complaint inasmuch as the Board exceeded its statutory authority when it failed to conduct the separate election for professional employees required by Section 9(b)(1). The court held further that the refusal of the Board to conduct the required election "works irreparable harm to the statutory right that an appropriate unit for collective bargaining purpose shall only include professional employees unless a majority of them vote for inclusion of non-professional employees within the unit" (R. 30-31).

In appealing to the court below the Board did not contest the district court's construction of Section 9(b)(1) (Pet. p. 9). The Board contended that the district court lacked original jurisdiction to grant equitable relief with respect to a representation determination even though such determination exceeded the Board's statutory authority. Such

relief, the Board argued, could be had only in the courts of appeal and only by way of review of a "final order" in an unfair labor practice proceeding based upon the representation determination (Pet. p. 9).

On September 16, 1957, the court below affirmed the decision of the district court, holding that this case did not involve "the wide area of determinations which depend upon the Board's expertise and discretion", but entailed "Board violation of a statutory requirement and resulting injury" (Pet., Appendix A, p. 19). Hence the court concluded that the representation determination could be reviewed by an original equity suit in the federal district court, particularly since "review by way of §10 is too remote and conjectural to be viewed as providing an adequate remedy" in this case (Pet., Appendix A, pp. 19-20).[4]

Argument.

1. The Court below was clearly correct in its holding that a Board representation determination arrived at in violation of an explicit statutory requirement may be reviewed by an independent equity suit in a federal district court where no other adequate remedy exists. This case, as the court below stated, presents "a different 'type of problem'." (Pet., Appendix A, p. 19). The broad discretion and

[4] The court rejected the Board's argument that Engineers' Association could have obtained review of the certification under the statutory review procedure by refusing to bargain with the Company except for a unit of only professional employees and so subject Engineers' Association to a charge that it had violated Section 8 (b) (3) of the Act. Since the Company was not aggrieved by the Board's certification providing for a mixed bargaining unit, the Company had no reason whatsoever to insist that the Engineers' Association bargain in the unit as certified. Absent a willingness of the Engineers' Association to bargain in the unit as certified, the employer "would then be free to deal with all employees individually" (Pet., Appendix A, pp. 19-20).

expertise which the Act permits the Board to enjoy under Section 9 (b) in determining an appropriate bargaining unit is plainly withdrawn by the 9 (b) (1) proviso with respect to a mixed unit of professional and non-professional employees.

In the instant proceeding the Board ignored the explicit limitation placed upon its discretion by Section 9 (b) (1) and acted outside the power given to it by Congress with the result that the professional employees suffered a deprivation of a statutorily created right. The court below was therefore called upon to prevent agency action in derogation of statutory authority rather than to enter upon an area reserved to agency discretion. The exercise of discretion in representation determination does not give the the Board the power to decline to comply with a limitation upon such discretion. "To do so would but grant to the Board the Congressional power of repeal." *Office Employees International Union* v. *National Labor Relations Board*, 353 U. S. ....., 1 L. ed. 2d 846, 851.

Thus this case satisfies the test of departure from statutory requirements with resulting injury which the Court in *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401 and *Inland Empire District Council* v. *Millis*, 325 U. S. 697 set forth as an essential requisite to the exercise of original jurisdiction in the federal district court.

The Board, however, contends that the jurisdictional issue remains undecided (Pet. pp. 10-11). Even assuming that the *Inland Empire* case once more reserved the question, the decision of the Court in *Leedom* v. *International Union of Mine, Mill and Smelter Workers*, 352 U. S. 145, removed the doubt. In that case (which the Board ignores in its Petition though cited by the court below in support of

its holding, Pet., Appendix A, p. 19, note 2), the Court affirmed the holding of the court below in *International Union of Mine, Mill and Smelter Workers* v. *Farmer,* 96 U. S. App. D. C. 416, 226 F. 2d 780, and *Farmer* v. *International Fur & Leather Workers Union,* 95 U. S. App. D. C. 308, 221 F. 2d 862, that the district court possessed original jurisdiction to enjoin the Board from acting without authority under Section 9 (h) of the Act in depriving a labor organization of its compliance status.

In the *Mine, Mill* case, as in the instant suit, a Board administrative determination was challenged by independent equity suit in the federal district court. In the *Mine, Mill* case, as in the instant suit, original jurisdiction was sought to be predicated on the ground that the Board action in question was in excess of statutory power. In the related and earlier *Farmer* v. *United Electrical Workers,* 93 U. S. App. D. C. 178, 211 F. 2d 36, cert. den., 347 U. S. 943, the court below expressly held that Board departure from statutory requirements with resulting injury fulfilled the condition necessary to assertion by the district court of original equity jurisdiction. In upholding the court below in the *Mine, Mill* case, the Court cited with approval the related decisions of the court below in the *United Electrical* and *International Fur & Leather Workers* cases. The court below, in turn, cited this Court's decision in the *Mine, Mill* case as well as its own decision in the *United Electrical Workers* case as authority for the proposition that agency action in excess of or in departure from statutory authority in an area sharply removed from discretion and expertise furnishes the showing necessary to the assertion of original jurisdiction in the federal district court (Pet., Appendix A, p. 19, note 2).

The Board argues that in *United Electrical Workers* the court below decided only that action "preliminary to any unfair labor practice or representation determination would provide the basis of direct review" (Pet., pp. 11-12, note 8). In the instant suit, the Board's argument continues, the action involves review of a particular representation determination as to which the Board enjoys complete immunity from direct review. This same argument was advanced by the Board in the court below without avail. As Judge Bazelon indicated in the Court's opinion, the "type of problem" presented in the instant case is no different from that presented in *United Electrical Workers* (Pet. p. 19, and note 2). In short, direct review is available in the face of Board departure from a statutory requirement regardless of the incidence of the departure in the administrative process. It is the exercise of unauthorized power by the Board, whether such exercise affects a determination of the bargaining unit under Section 9(b) of the Act or a determination of compliance under Section 9(h) which, the court below correctly decided, permits of direct judicial restraint.

2. The Board contends that under the decision of the court below all representation determinations are susceptible of direct review with horrendous effect upon the administration of the Act (Pet. p. 12, note 9, 15-16). The Board protests too much. As previously noted (*infra*, pp. 6-7), the court below carefully delineated the narrow area within which direct review of a Board representation determination could be said to be available in the district court. Only departure from the proscribed area of determining as appropriate a mixed bargaining unit of professional and non-professional employees without the necessary separate election may become the object of direct

judicial restraint. The essential areas of permissible exercise of statutory discretion under Section 9 (b), as distinguished from the limiting 9 (b)(1) proviso, remain judicially reviewable only in the mode provided in the statute.

Thus, in the instant suit, respondent does not challenge the Board's authority to determine the job categories that are professional under Section 2 (12) of the Act. Nor does respondent challenge the Board's authority to decide on a tentative or voting group basis that professional and non-professional employees may be included in the same bargaining unit. Rather is respondent's challenge concerned solely with the Board's refusal to be governed in the final determination of whether a mixed unit is appropriate by the wishes of the professional employees themselves as the statute commands.

For the Board to construe the holding below as leading to direct review of representation cases *en masse* is to ignore Judge Bazelon's caveat:

> "Equitable relief is clearly barred in the wide area of determinations which depend on the Board's expertise and discretion; as for example, in *Switchmen's Union* [320 U. S. 297] that railroad yardmen should be included in a unit with certain other smaller groups of railroad employees, or in *DePratter* [98 U. S. App. D. C. 74, 76, 232 F. 2d 74, 76], that full time production employees should be included in a unit with employees who devote only part time to production and the rest to other tasks" (Pet., Appendix A, pp. 18-19).

Since the area of extra-statutory judicial review is thus narrowly circumscribed, the holding of the court below leaves undisturbed the usual remedy of statutory judicial review with regard to the greatest proportion of the

Board's case load of representation cases. Nevertheless, the Board asserts that delay in the determination of bargaining representatives arising out of direct judicial review of action in excess of Board statutory authority must be avoided no less than in the case of direct judicial review of action within the Board's statutory authority (Pet. p. 19).

We do not understand the law to be that a power expressly removed by Congress may nevertheless continue to be exercised by the Board simply because delay in the ultimate completion of the representation proceeding would ensue upon an injured party's seeking equitable relief. As between the Congressional objective to avoid delay in representation proceedings, on the one hand, and the Congressional objective to curb the Board's exercise of discretionary authority in the particular area of representation determination explicitly delineated in Section 9 (b) (1), on the other, we believe the latter consideration must be regarded as paramount. Otherwise the professional employees would suffer a sacrifice or obliteration of a right Congress has created in their behalf were the Board, by an unauthorized action, to leave them completely without the unqualified right of self-determination of their own bargaining unit provided by the true reach of the Act. The decision of the court below, correctly viewed in the context of unlawful exercise of power, leaves unimpaired the Congressional objective to limit judicial review in the commonly encountered representation determination. Consequently, the instant suit fails to raise questions of importance in the administration of the Act.

3. The Board asserts that the decision in the instant case is contrary to the decisions of the courts of appeals of both the Second and the Fourth Circuits. The Board con-

strues the holdings in *Fitzgerald* v. *Douds*, 167 F. 2d 714, 716-717 (C. A. 2) and *Madden* v. *Brotherhood*, 147 F. 2d 439, 442-445 (C. A. 4) as standing for the proposition "that a Board representation determination may not be reviewed in a federal district court, not only where the exercise of Board discretion is at issue, but also where questions of the Board's legal power are involved" (Pet. p. 13).

Neither case cited by the Board presents a conflict with the decision of the court below for the reason that neither case involved action on the part of the Board admittedly in derogation of its statutory authority. Indeed, in *Madden* v. *Brotherhood, supra*, Judge Parker stated:

> "The case is not one where the action of the Board is without constitutional or statutory authority, as in *Colorado* v. *Toll*, 268 U. S. 228, upon which the Brotherhood relies. See our decision in *Ferris* v. *Wilbur*, 4 Cir., 27 F. 2d 262 and cases there cited for the distinction (*id.*, at 442)".

In *Fitzgerald* v. *Douds, supra*, the Second Circuit concluded that the plaintiff unions brought suit prematurely in that they were not adversely affected by Board action setting down the representation case for a hearing nor had the plaintiffs demonstrated that the holding of the hearing would cause irreparable injury. The court held that the Board had proceeded within rather than outside the authority given it by the statute.

Thus neither case advanced by the Board, in support of its contention that a conflict with the decisions of other courts of appeal exists, directly reaches the precise issue posed in the instant suit. Moreover, the question presented here has but narrow application in the administration of the Act.

Conclusion.

The decision below is correct and presents neither a substantial question warranting review nor a conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: December 23, 1957.